No. 2621

United States Circuit Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

WILLIAM B. POLAND
AND
FREDERICK WILLIAM LOW,
Appellees.

Brief of Appellant

Upon Appeal from the District Court of the United States for the Territory of Alaska, Third Division

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PACIFIC BANKER

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STATEMENT OF THE CASE.

This action was brought by the appellant the United States of America, by and under the authority and direction of the Attorney General of the United States by filing its complaint on July 20, 1912, which complaint prayed that a patent issued to William B. Poland by the United States of America on March 22, 1909, for land embraced within Survey No. 242 embracing 160 acres of land be vacated, cancelled, and declared to be null and void and that a deed made by the patentee, William B.

Poland to Frederick William Low conveying land embraced in Survey No. 242 be also vacated, cancelled, and declared to be null and void.

That thereafter, upon application to the court leave was granted to the appellant to file an amended complaint, and said amended complaint was filed in the District Court of the Territory of Alaska, Third Division, on October 15, 1914, which substantially sets forth the following facts:

That heretofore, to-wit, on or about the 6th day of September, 1905, the above named defendant, William B. Poland entered upon and took possession of the land hereinafter described, said land being then and there part of the public lands and public domain of the United States, with the purpose and intent of acquiring title thereto as the assignee of certain soldier's additional homestead entry rights, pursuant to Section 2306 of the Revised Statutes of the United States and Acts amendatory thereto, and caused an official survey thereof to be made, whereby said land was surveyed in the form of two tracts or parcels of land; said land entered and surveyed as aforesaid, is in the Kenai Recording Precinct, District of Alaska, and more particularly bounded and described as follows:

United States Survey No. 241.

Beginning at corner No. 1 on the shore of Resurrection Bay, latitude sixty degrees, seven minutes north, longitude one hundred forty-nine degrees, seven minutes west, said point being marked by an iron pin, three inches in diameter, marked "S. 241, cor. No. 1", thence

south sixty-one degrees, thirty-seven minutes west, two and sixty-one-hundredths chains; thence south seventy-eight degrees, west nineteen and ten-hundredths chains; thence south fifty-two degrees, fifteen minutes west, ten chains; thence south seventy-one degrees, fifty minutes west, three chains; thence south thirty-one degrees, twenty-seven minutes west, three and twenty-hundredths chains to corner No. 2, which corner is marked by an iron pipe three inches in diameter, marked "S. cor. No. 2", thence west six and fifty-nine-hundredths chains to corner No. 3, which corner is marked by an iron pipe three inches in diameter marked "S. 241, cor. No. 3", thence north forty-seven and eighty-eight-hundredths chains to corner No. 4, which corner is marked by an iron stake three inches in diameter marked "S. 241, cor. No. 4", thence east forty chains to corner No. 5, which corner is marked by iron pipe three inches in diameter, marked "S. 241, cor. No. 5", thence south thirty-two and eighty-eight-hundredths chains to corner No. 1, the place of beginning, containing one hundred fifty-nine and seventy-five one-hundredths acres, being the land embraced in United States Survey No. 241, according to the official plat of said survey returned to the General Land Office by the Surveyor General, and

United States Survey No. 242.

Beginning at corner No. 1 near the north shore of Resurrection Bay, identical with corner No. 5, U. S. Survey No. 241, an iron pipe three inches in diameter, marked "S. 242, cor. No. 1"; thence west forty chains to corner No. 2, an iron pipe three inches in diameter, marked "S. 242, cor. No. 2", thence north forty chains to corner No. 3, an iron pipe three inches in diameter, marked "S. 242, cor. No. 3"; thence east forty chains to corner No. 4, an iron pipe

three inches in diameter marked "S. 242, cor. No. 4"; thence south forty chains to corner No. 1, the place of beginning, containing one hundred and sixty acres, being the land embraced within United States Survey No. 242, according to the official plat of said survey returned to the General Land Office by the Surveyor General.

That the land embraced within said survey constitutes and is a single body of land, containing 319.75 acres.

That thereafter, to-wit, on the 26th day of April, 1906, the said William B. Poland filed in the United States Land Office, at Juneau, Alaska, two applications whereby he, as the assignee of certain soldier's additional homestead entry rights, applied under Section 2306 of the Revised Statutes of the United States to enter the land above described, one of said applications covering the land embraced in said survey No. 241, and the other application covering the land embraced in said survey No. 242.

That thereafter, to-wit, on the 20th day of January, 1908, the requisite proofs having been made, a patent for the land embraced in said survey No. 241 was issued to the said William B. Poland, a copy of which patent is hereto attached, marked Exhibit A., and made a part hereof. (Exhibit in Transcript.)

That, on the 30th day of July, 1906, the defendant, William B. Poland, filed or caused to be filed in the United States Land Office at Juneau, Alaska, in support of his said application for a patent to the land embraced in said survey No. 242, an affi-

davit, subscribed and sworn to by H. E. Revell and Frank Ballaine, which affidavit contained the following false statement:

> Said tract of land (referring to the land embraced in said Survey No. 242) does not exceed 160 acres in extent and is in frontage less than 160 rods along the shore of any navigable water, and is more than eighty rods distant from any other survey or entry under the provisions of said Act of May 14th, 1898,

the Act referred to in said statement being the Act of Congress entitled "An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," approved May 14, 1898, as amended by the Act of Congress entitled "An Act to amend Section one of the Act of Congress approved May fourteenth, eighteen hundred and ninety-eight, entitled 'An Act extending the homestead laws and providing for a right of way for railroads in the District of Alaska," approved March 3, 1903.

That said statement was and is false in this, that said tract of land referred to in said affidavit was not more than eighty rods distant from any other survey or entry under the provisions of said Act of May 14th, 1898, as then amended, but was adjoining and contigious to that certain tract of land embraced within said survey No. 241, upon which a soldier's additional homestead entry and right had been theretofore made by the said William B. Poland as hereinbefore set forth, and was part and parcel of a single body of land containing more

than one hundred and sixty acres, to-wit: 319.75 acres, entered by soldier's additional homestead and entry rights under said Act of May 14th, 1898, as amended, said single body of land being the land embraced within said surveys No. 241 and No. 242.

That said statement was false and fraudulent in that it concealed from the officials of the Land Department of the United States the fact that land in excess of one hundred and sixty acres in a single body was entered by soldier's additional homestead right under the application of the said defendant, William B. Poland, in support of which application said affidavit was filed.

That by means of said false affidavit filed as aforesaid, the said defendant, William B. Poland, knowingly, falsely and fraudulently represented to plaintiffs and to the officials of the Land Department of the United States, whose duty it was to pass upon said application, that no land in excess of one hundred and sixty acres in a single body in Alaska was entered and applied for by soldier's additional homestead rights under said application; whereas in truth and in fact land in excess of one hundred and sixty acres in a single body in Alaska was thereby entered and applied for under soldier's additional homestead rights, which fact the said defendant, William B. Poland, then and there well knew; that the said defendant, William B. Poland, caused said false and fraudulent representations to be made by means thereof, with the intent and for the purpose of deceiving said officials of the Land

Department of the United States and leading them erroneously to believe that the land embraced within said survey No. 242 was open and subject to entry and patent under soldier's additional homestead rights and to induce said officials to cause a patent to issue therefor, and with the further intent to defraud plaintiffs and unlawfully to deprive plaintiffs of the use and enjoyment of said land embraced in said survey No. 242.

That the Assistant Commissioner of the General Land Office of the United States, relying upon the aforesaid false and fraudulent representations and believing them to be true and being induced thereby to do so, in the erroneous and mistaken belief that the land embraced within said survey No. 242 was open and subject to entry and patent under soldier's additional homestead rights and that the defendant, William B. Poland, was lawfully entitled to a patent thereto, mistakenly, erroneously, without authority and in violation of law, and without jurisdiction so to do, approved said entry and application for a patent to the land embraced in said survey No. 242; and thereafter, to-wit, on the 22nd day of March, 1909, the President of the United States, likewise relying upon and being likewise deceived and induced by said false and fraudulent representations, under the same misapprehension as to the law and the facts, mistakenly, erroneously, without authority and in violation of law, and without jurisdiction so to do, caused to be signed, executed and delivered to the said defendant, William

B. Poland, a patent to the land embraced within said survey No. 242, a copy of which patent is hereto attached, marked Exhibit E, and made a part hereof. (Exhibit in Transcript.)

That Congress passed an Act approved March 3, 1903, entitled "An Act to amend Section One of the Act of Congress approved May 14, 1898, entitled 'An Act extending the homestead laws and providing for a right of way for railroads in the District of Alaska' ", which, among other things, provides that no more than one hundred and sixty acres shall be entered in any single body by soldier's additional homestead right.

That the land embraced within said survey No. 242 was by the provision of the Act of Congress above mentioned reserved from entry and patent under soldier's additional homestead right by virtue of the soldier's additional homestead entry theretofore made by the said defendant, William B. Poland, upon the land embraced within said survey No. 241; that by force of the foregoing, the patent issued to the said defendant, William B. Poland, for the land embraced within said survey No. 242 was and is null and void for the reason that more than one hundred and sixty acres of land in a single body entered by soldier's additional homestead rights was thereby attempted to be granted to the defendant, William B. Poland.

That thereafter, on the 25th day of May, 1909, the said William B. Poland made, executed and delivered to the above named defendant, Frederick

William Low, and to his heirs and assigns forever, the land hereinbefore described, and covenanting to and with the said Low to warrant and defend the same against any and all persons claiming or to claim title thereto; a copy of which deed is hereto attached and marked Exhibit C, and made a part hereof. (Exhibit in Transcript.)

That the land embraced within said survey No. 242 during all the times hereinbefore mentioned was and now is public land and part of the public domain of the United States and the said United States have been at all times, and now are, entitled to the immediate possession thereof; that the aforesaid patent to the land embraced within said survey No. 242 and the deed hereinbefore mentioned, in so far as said deed refers to the land embraced within said survey No. 242, are, and each of them is, a cloud upon plaintiffs' title to said land.

That the appellees and defendants in the lower court, and each of them demurred to said amended complaint of plaintiffs on the ground that said amended complaint did not state facts sufficient to constitute a cause of action against said defendants or either of them either in law or equity, and that said defendant, William B. Poland, further demurred to plaintiffs' amended complaint on the ground that it did not state facts sufficient to constitute a cause of action at law or to entitle the plaintiffs to relief in equity against said defendant, and upon the further ground that it appears from the face of the amended complaint that said defendant is

not a party to said action. That after hearing the arguments of the respective counsels and after taking the matter under consideration, the district court rendered a decision on March 23, 1915, sustaining the demurrer of the defendants and each of them.

Thereafter upon application of the plaintiffs the court made an order, on May 10, 1915, allowing the filing, and making the same a part of the record of the case, the affidavits of J. H. Romig, F. B. Wood, and Edmund Rudolph, showing the amount involved and the value of the subject matter in controversy in said action, which affidavits each showed that said property was worth from three thousand (3000) to five thousand (5000) dollars. That thereafter, and on May 29, 1915, a decree was entered by the court dismissing plaintiffs' action and that thereafter, and on the 21st day of June, 1915, an order was entered amending said decree sustaining the demurrer of the defendants and each of them to plaintiffs' amended complaint, and dismissing said action of plaintiffs.

QUESTIONS INVOLVED.

The questions involved and the manner in which they are raised are shown in the following assignments of error: The court erred in sustaining the demurrers of the defendants and of each of said defendants to the plaintiffs' amended complaint; the court erred in entering the decree and amended decree herein sustaining the demurrers of the de-

fendants and dismissing the amended complaint and the plaintiffs' action herein.

The following points and authorities are relied on by the plaintiffs, appellant herein, to sustain their contentions.

POINTS AND AUTHORITIES.

I.

The principal matter involved in this action is the interpretation and construction to be placed upon Section 101 of the Compiled Laws of Alaska, which embraces the Act of Congress approved March 3, 1903, (See 32 Stat. L. 1028) in regard to the amount or area of land which can be entered under said section by means of soldier's additional homestead rights *"in any single body."* The plaintiffs in the court below, the appellant here, contend that said Section 101 authorizes the entry of only 160 acres of land under such soldier's additional homestead rights "in any single body"; and if any other or further amount or quantity of land is sought to be taken up by any person it must be separate and apart from any other entry under such soldier's additional homestead right, at a distance to be fixed by the regulations, which may be made by the Secretary of the Interior, which regulations are authorized by said Section 101.

II.

It is a general and well settled rule in the construction of statutes that where a statute is of doubtful meaning and susceptible of two construc-

tions, the court may look into prior and contemporaneous acts, the reasons which induced the Act in question, the mischiefs sought to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine the proper construction.

Hamilton vs. Rathbone, 175 U. S. 419.
The Conqueror, 166 U. S. 123.
Smythe vs. Fiske, 23 Wall. 374.
United States vs. Bowen, 100 U. S. 508.
Vitebro vs. Friedlander, 120 U. S. 707.
United States vs. Lacher, 134 U. S. 624.

III.

In construing the statutes courts should not close their eyes to what they know of the history of the country and of the law and the condition of the law at the particular time, of the public necessities felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts existing at the time of its enactment.

Mannington vs. Hocking Valley R. R. Co., 183 Fed. 155.

Cooley's Const. Lim. (6th Ed.) 69-74.

24 Am. & Eng. Ency. Law, 597, 605, 611, 616, 618.

State vs. Vanderbilt, 37 Ohio St. 643.
In re Hathaway's Will, 4 Ohio St. 385.
State vs. Schlatterbeck, 39 Ohio St. 268, 271.
Smith vs. Townsend, 148 U. S. 494.

Holy Trinity Church vs. United States, 143 U. S. 463.

United States vs. Union Pacific Railroad, 91 U. S. 72.

IV.

The legislation upon the subject of public land has always favored the actual settlers and not speculators, (*Morton vs. Nebraska,* 21 Wall. (U. S.) 671); Laws passed by Congress extending the homestead laws of the United States to Alaska, see Act of May 14, 1898, (30 Stat. L. 409) Act of Congress March 3, 1903, amendatory thereof, Section 101 Compiled Laws of Alaska, (32 Stat. L. 1028), were intended to favor actual settlers and the development of Alaska, and were restrictive upon those who strive to obtain public lands in Alaska by the means of scrip, land warrants, and soldier's additional homestead rights. The statute should be construed so that it will effectuate the intention and policy of the legislation and so as to have some purpose and effect.

Stephens vs. Cherokee Nation, 174 U. S. 480.

Lau Ow Bew vs. United States, 144 U. S. 47, 59.

Sioux City etc. R. R. Co. vs. United States, 159 U. S. 360.

United States vs. Jackson, 143 Fed. 786.

United States vs. Winn, 3 Summ. 209; Fed. Cases No. 16740.

United States vs. Raft of Lumber, 13 Fed. 796.

The Lizzie Henderson, 20 Fed. 524.
United States vs. Ellis, 51 Fed. 808.
United States vs. Lacher, 134 U. S. 624.

V.

Where a statute is of doubtful construction, the construction placed upon it by the officers of the department whose duty it is to construe it is persuasive upon the courts, (*Schell vs. Fauche,* 138 U. S. 562), (*United States vs. Hammers,* 221 U. S. 220), and this rule is strengthened where the statuates direct that the department should make the necessary regulations to carry it into effect, (*Jacobs vs. Pritchard,* 223 U. S. 200). The Commissioner of the General Land Office has ruled that there is a limitation on the acquisition of land in Alaska by means of soldier's additional homestead right to 160 acres in any single body and the court will take judicial knowledge of such ruling in a case on demurrer.

Southern Pacific Railroad Co. vs. Grocck, 68 Fed. 609.
Caha vs. United States, 152 U. S. 211.

VI.

The law is settled that questions of fact arising in the administration of public lands are committed to the officers of the Land Department for determination largely on *ex parte* proceedings, and if applicants for grants and patents impose on such officers and secure grants and patents, any patents

so secured are either void or voidable and may be annulled in a suit brought by the Government.

United States vs. Minor, 114 U. S. 233.

Smelting Company vs. Kemp, 104 U. S. 641.

Burfenning vs. Chicago etc. R. Co., 163 U. S. 323.

Morton vs. Nebraska, 21 Wall. (U. S.) 660.

Eastern Oregon Co. vs. Brosnan, 147 Fed. 809.

Doolan vs. Carr, 125 U. S. 618.

Davis's Admr. vs. Weibbold, 139 U. S. 507-529.

Knight vs. U. S. Land Ass'n, 142 U. S. 161.

Further, if the officers act without authority and if the land purported to be patented was not within their control, then their act was void for want of power in them to act on the subject matter of the patent, in other words, the officers were without jurisdiction to act.

Doolan vs. Carr, 125 U. S. 625 (with large number of citations.)

Burfenning vs. Chicago Railway Co., 163 U. S. 321.

Morris vs. United States, 174 U. S. 243.

Smelter Company vs. Kemp, 104 U. S. 641.

VII.

No tender is necessary to be made by the Government as the prerequisite to cancel the patent in question. The court has full power and control over the matter and may prescribe or not as it sees fit the return of the soldier's additional homestead

right used by the defendants, according to the equities of the case.

Morris vs. United States, 174 U. S. 244.
Piersoll vs. Elliott, 6 Peters (U. S.) 95.
United States vs. Trinidad Coal & Coking Co., 137 U. S. 160.
United States vs. Budd, 144 U. S. 154.
Jones vs. McGinn, 140 Pac. 995.
Bryant vs. Isberg, 74 Am. Dec. 661.
Vanliew vs. Johnson, 6 Thompson's C. 648.
Anthony vs. Day, 52 How. Prac. 35.
Bloomer vs. Waldron, 3 Hill 366.
Hoyt vs. Jacques, 139 Mass. 266.

VIII.

No question about a bona fide purchaser can enter into this case, as the case is one in which the patent was issued without authority or power on the part of the officer of the Land Department. Furthermore the plea of bona fide purchaser would be one of pleading and proof of payment and the recital in the deed would not be sufficient.

United States vs. Brannon, 217 Fed. 851.
Lakin vs. Sierra Buttes Gold Min. Co., 25 Fed. 337.
United States vs. Hill, 217 Fed. 846.
Boone vs. Chiles, 10 Pet. (U. S.) 177.
Wright-Blodgett Co. vs. United States, U. S. Supreme Court, February 23, 1915.

IX.

In regard to the amount involved and the value of the subject matter in controversy, the affidavits filed show that it is over five hundred dollars, the amount required by Section 1337 of the Compiled Laws of Alaska for the purpose of taking an appeal to the Circuit Court of Appeals. When there is nothing in the complaint of the case to show such value, it is good practice to allow affidavits to be filed showing value.

Wilson vs. Blair, 119 U. S. 387.

Sharon vs. Terry, 36 Fed. 349.

Davie vs. Heyward, 33 Fed. 95.

Gage vs. Pumpelly, 108 U. S. 164.

Harris vs. Barber, 139 U. S. 366.

Chesapeake Beach Ry. Co. vs. Washington Ry., 199 U. S. 248.

X.

It is the amount which appears in the Appellate Court that governs the right of appeal.

Decker v. Williams, 73 Fed. 308, citing:

Gordon v. Ogden, 3 Peters (U. S.), 33.

Pittsburgh Loco. Works v. State Nat'l Bank of Keokuk, 154 U. S. 626.

Jones v. Fritchle, 154 U. S. 590.

Railway Company v. Booth, 152 U. S. 671, and a large number of other cases from the United States Supreme Court.

There is no conflict shown in the record here as to the value of the subject matter in controversy as

two affidavits filed in the District Court show that such value is five thousand dollars and the other affidavit fixed the value at three thousand dollars, and no counter affidavits were filed by the defendants.

ARGUMENT.

Appellant's View of Meaning of Law.

This action was brought to set aside, cancel, and annul a certain patent issued by the Land Department of the United States for certain lands situate in the Third Judicial Division of the Territory of Alaska, contained within U. S. Survey No. 242 and embracing one hundred and sixty acres, which patent was issued erroneously and without authority of law, on the 22nd day of March, 1909, to the defendant and appellee, William B. Poland, and afterwards conveyed by him by deed in which there is a consideration of one ($1.00) dollar and other good and valuable considerations, to the defendant and appellee, Frederick William Low. The main, principal and overshadowing matter for determination in this action is the interpretation and construction to be placed upon Section 101 of the Compiled Laws of Alaska, which embraces the Act of Congress, approved March 3, 1903, (See 32 Stat. L. 1028) in regard to the amount and area of land which can be entered under said section by means of soldier's additional homestead rights, "in any single body."

The plaintiffs contend that said Section 101 authorizes an entry of only 160 acres of land under such soldier's additional homestead right in any

single body, and if any other or further amount or quantity of land is to be taken up, it must be separate and apart from any other entry under such soldier's additional homestead right in any single body, at a distance to be fixed by any regulations that may be made by the Secretary of the Interior, which regulations are authorized by said Section 101.

Plaintiffs, the United States, contend that the meaning of said Section 101, in regard to the restriction in said section is that Congress has made a reservation and restriction on the quantity of land which can be taken up under a soldier's additional homestead right to the limit of 160 acres "in any single body," that there is no warrant or authority of law for the Land Department of the United States for granting a patent for more than said amount, and that consequently the second patent issued on March 22, 1909 to said appellee, William B Poland, embraced in U. S. Survey No. 242, is beyond the power and authority of the Land Department of the United States, to grant, because said Poland, had already taken up 159.75 acres under a soldier's additional homestead right under U. S. Survey No. 241, for which patent had been issued to him in January 20, 1908, and that said tracts were really one tract embracing in all 319.75 acres, thus taking up the latter number of acres in "a single body" in violation of the statute.

APPELLEES' VIEW OF LAW.

The appellees, on the other hand, contend that a person is entitled to enter any number of contiguous

acres of land by soldier's additional homestead rights provided there are no more than 160 acres in any one entry and accordingly, as will be seen from the allegations of the amended complaint, said appellee, William B. Poland, on the same day, to-wit, on the 26th day of April, 1906, filed two applications for land at the United States Land Office at Juneau, Alaska, one embracing Survey No. 241 and the other Survey No. 242, in all embracing 319.75 acres of contiguous land "in one single body."

General Rules of Statutory Construction.

The appellant will therefore first take up the discussion of this main and principal question of the construction to be placed upon the Act of March 3, 1903, as set forth in said Section 101, leaving the minor points of discussion and consideration for the latter part of this argument.

At the outset it will be well to have in view the general principles of statutory construction which guide courts in ascertaining the meaning of any given statute. It is a general and well settled rule in the construction of statutes that where a statute is of doubful meaning and susceptible of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs sought to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction, and further where the act is clear upon its face, and when standing alone it is

fairly susceptible to one construction that construction must be given it.

Hamilton v. Rathbone, 175 U. S. 419.
The Conqueror, 166 U. S. 123.
Smythe v. Fiske, 23 Wall. 374.
United States v. Bowen, 100 U. S. 508.
Vitebro v. Friedlander, 120 U. S. 707.
United States v. Lacher, 134 U. S. 624.

And as it was said in *Manning v. Hocking Valley Ry. Co.,* 183 Fed. 155, "Moreover in construing statutes the courts should not close their eyes to what they know of the history of the country and of the law, of the condition of the law at a particular time, of the public necessities felt, and other kindred things, for the reason that regard must be had to the words in which the statute is expressed as applied to the facts existing at the time of its enactment.

Cooley's Const. Lim. (6th Ed.), 69-74.
24 Am. & Eng. Ency. Law, 597, 605, 611, 616, 618.
State v. Vanderbilt, 37 Ohio St. 643.
In re Hathaway's Will, 4 Ohio St. 385.
State v. Schlatterbach, 39 Ohio St. 268, 271.

To the same effect are

Smith v. Townsend, 148 U. S. 492.
Holy Trinity Church v. U. S., 143 U. S. 463.
United States v. Union Pacific Railroad, 91 U. S. 72.

In the case cited by the District Court in its decision, of *Shenk v. Aumiller,* 217 Fed. 969, the

court took into consideration the common knowledge that in 1890 the public land area open to settlement was becoming very limited and that Congress adopted a new policy by limiting the number of acres to be entered by a person and that said limitation applied to all lands except mineral lands, in regard to which Congress continued the liberal policy with a view to discovery and development. And as was said in the case of *Morton v. Nebraska,* 21 Wall. (U. S.) 671, "The legislation upon the subject of public lands has always favored the actual settlers but the construction contended for would discriminate against them and favor persons whose interest Congress has never been swift to prompt," —referring, as the court was to them, the speculators.

LAND LAWS OF ALASKA FAVOR ACTUAL SETTLERS.

Under these canons of construction it may be seen that the laws passed by Congress extending the homestead laws of the United States to Alaska as shown by the Act of May 14, 1898 (See 30 Stat. L. 409, found on page 454, Carter's Annotated Alaska Codes), and the Act of Congress of March 3, 1903, amendatory thereof, found in Sec. 101 in the Compiled Laws of Alaska (See 32 Stat. L. 1028), were intended to favor the actual settlers and the opening up and development of Alaska, and were restrictive of those who would strive to obtain public lands in Alaska by means of scrip, land warrants, and soldier's additional homestead rights. In other words,

the court can take into consideration the wish and the purpose and the tendency as expressed by those acts that Congress was in favor of the homesteader and pioneer and was opposed to the monopolization of lands by those who had ample means to buy scrip and other speculative means to obtain title to large bodies of lands in Alaska. The court can go further and take into consideration from its knowledge of matters of general history that there had been a flagrant abuse of the use of scrip in other parts of the United States in permitting large corporations to take up some of the most valuable lands, timber and other lands, in the country, which abuse is of common knowledge, shown by the records in the Land Department of the United States and by the general discussion of the matter in the press and publications in different parts of the United States. Congress evidently wished that Alaska might be spared from the invasion of those land locusts and wished to encourage and foster the development of the Territory by those who would be actual occupants of the lands. This spirit and purpose was seen in the first Act, that of May 14, 1898, in which it is provided that, "no indemnity, deficiency or lieu lands pertaining to any land grant whatsoever originally outside of said District of Alaska shall be located within or taken from lands in said District." That Act placed an embargo upon the use of the various lieu scrip owned by many large railroad corporations outside of Alaska, but the Act of March 3, 1903, amendatory thereof, goes further and pro-

vides that "no indemnity, deficiency or lieu land selections pertaining to any land grant outside of Alaska shall be made and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said District except as now provided by law." The last clause "except as now provided by law" evidently refers to such scrip as Valentine scrip and possibly some other which had vested rights on all the public lands in the United States and over which Congress could not exercise any control. But it will be seen that the Act goes further and into greater particularity in excluding the use of scrip and other similar means of taking up land than did the Act of May 14, 1898, in that further provision made in the Act of March 3, 1903, as follows: "And provided further that no more than 160 acres shall be entered *in any single body* by such scrip, lieu selection or soldier's additional homestead right." This provision was not in the Act of May 14, 1898, and from its very terms places a further restriction upon the use of scrip and soldier's additional homestead rights in taking up lands in Alaska. In order to present the exact language of the statute referred to, as far as applicable to the present case and discussion, we present excerpt law of May 14, 1898, as follows:

> "Homestead Laws Extended to Alaska: Be it enacted, etc., that the homestead land laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldier's addi-

> tional homestead rights, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said District of Alaska shall be located within or taken from lands in said District."

The amendatory law of March 3, 1903, is as follows:

> "That all the provisions of the homestead laws of the United States not in conflict with the provisions of this Act, and all rights incident thereto, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu land selections pertaining to any land grant outside of the District of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said District except as now provided by law; and provided further that no more than one hundred sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right."

We would direct the attention of the court further to the fact that the law of March 3, 1903, provides that all the rights given by said law are subject "to such regulations as may be made by the Secretary of the Interior," and this provision becomes important as in the discussion of this case we will indicate further on. Seeing that there is such a marked and distinct change and amendment made by the law of March 3, 1903, over the law of May 14, 1898, we are now to ask whether Congress meant

anything by the insertion of the words "in a single body," or whether such words are a meaningless interpolation in the later Act of March 3, 1903. There was no restriction of this kind before the Act of 1903 and consequently a person could take up a quantity of land by means of soldier's additional homestead rights limited only to the amount that he possessed. If the construction is followed that is contended for by the appellees there will be absolutely no change in this regard from the Act of May 14, 1898, and the words "in a single body" would be void of meaning, effect, or purpose.

Statutes Should Be Construed to Have Purpose and Effect.

Again, we seek the light and aid of the rules of statutory construction to guide us and we insist that one of the primary and fundamental rules is that a statute should be sensibly construed so as to effectuate the intention and policy of the legislature and so as to have some purpose and effect. In speaking of words of a disputed meaning used in a statute in that particular case, the United States Supreme Court, in the case of *Stephen v. Cherokee Nation,* 174 U. S. 480, said: "The words cannot be construed as redundant and rejected as surplusage for they can be given full effect and it cannot be assumed that they intend to defeat but rather that they are an effectuation of the real object of the enactment."

As was said in *Lau Ow Bew v. United States,* 144 U. S. 47-59. "Nothing is better settled than that a statute should receive a sensible construction, such as

will effectuate the legislative intention and if possible avoid an unjust or absurd conclusion." This rule and case are cited with approval in,

Sioux City, etc., R. R. v. United States, 159 U. S. 593. 349-360.

In *United States v. Jackson,* 143 Fed. 783, the Circuit Court of Appeals of this District prescribes the rule in the following fashion: "Courts should search out and follow the true intent of Congress and adopt the 'sense' of words which harmonizes best with the context and promotes in the fullest manner the apparent policy and object of the legislation."

United States v. Winn, 3 Summ. 209, Fed. Cases No. 16740.

United States v. Raft of Lumber, 13 Fed. 796.

The Lizzie Henderson, 20 Fed. 524.

United States v. Ellis, 51 Fed. 808.

United States v. Lacher, 134 U. S. 624.

Stephens v. Cherokee Nation, 174 U. S. 480 (*supra*).

If the construction is placed upon the Act that the words in the statute "in any single body" make no change in the law then it would be attributing to Congress the doing of a vain, useless, and senseless thing. On the other hand, a sensible and reasonable view can be taken of these words and one that will promote the apparent policy and object of the legislation which was to place, as we have heretofore remarked, a restriction upon speculators and those seeking to monopolize large contiguous bodies of the public lands in Alaska by the use of the soldier's

additional homestead rights. Said amendatory Act of March 3, 1903, provides that the lands taken up shall be subject to such regulations as may be made by the Secretary of the Interior and the Secretary is thereby empowered to make such regulations so that a sufficient and reasonable distance shall separate lands taken up by means of the soldier's additional homestead rights, and such regulations would give effect to the words "in any single body," and would prevent a person or corporation from taking up a great contiguous body of public lands in Alaska, possibly at some strategic point or in some situation in which the public at large had a great and vital interest.

In other words, it would give the Secretary of the Interior the power given by the Act to use his knowledge of the public lands in Alaska in making statutory rules and regulations under which soldier's additional homestead rights might be exercised and of safe-guarding the rights of the public in any place where it might be desirable and advisable.

Departmental Construction is Persuasive.

There is another well settled rule of construction of public statutes which we would invoke, to the effect that where the statute is ambiguous or of doubtful construction the construction of the officers of the Department whose duty it is to construe is persuasive on the courts (see *United States v. Hammers*, 221 U. S. 200; *Schell v. Fauche*, 138 U. S. 562), and this rule is strengthened and reinforced where

the statute itself directs that said Department should make the necessary regulations to carry it into effect (*Jacobs v. Pritchard*, 223 U. S. 200). As an evidence of the Departmental construction we present the construction placed upon the use of these words "a single body," of the Act of March 3, 1903, in a memorandum decision of Fred Dennett, Commissioner of the General Land Office, and also the reasons for the same in an opinion and decision by the Acting Commissioner of the General Land Office to the Secretary of the Interior. This memorandum decision and the opinion accompanying it cover the six different points of the law of March 3, 1903, only the sixth of which applies to the present case, but as we contend that such a decision is entitled to come under the judicial knowledge of the court under authorities which we will later cite, the whole memorandum and supporting opinion are given. It will be noted that Commissioner Dennett in the sixth item of his memorandum decision concerning the space that should separate soldier's additional homestead entries holds as follows:

> *"6th.* The holding was that there must be a strip of land at least forty acres in square form, intervening between locations."

The memorandum and opinion in full are as follows:

COMMISSIONER'S MEMORANDUM.

> "Upon the return of the Commissioner, Oct. 3, 1911, there was submitted for consideration and signature a paper addressed to the Honorable Secretary of the Interior, initialed 'A,' W.

B. P., propounding certain questions in regard to the construction of the Act of May 14, 1898, as amended by the Act of March 3, 1903. The paper was not transmitted by him for the reason that he felt satisfied, in his own mind, as to the construction to be given the items under consideration and the statutes in question.

On the first question as to the construction of the words 'or other waters' the Commissioner held, that in view of the fact that at the time of the passage of the Act of 1898 the question under discussion was more in regard to the monopolization of the water fronts for fishery purposes, the words 'or other waters' must be construed as meaning all streams of such size and dimensions affording spawning grounds for marketable fish. In regard to the difficulty of enforcement, instructions should be given to the inspectors when reporting on any locations, to set forth in their report, as to whether or not the location abutted on such waters.

2nd. In regard to the measurement of the reserved spaces of eighty rods, the Commissioner held that the measurements should be in conformity with the words of the statute, which provides that there shall be spaces of eighty rods between all such claims, which would indicate that the spaces must be measured along a straight line between the points of the two locations which are the nearest one to another.

3rd. The holding of the Commissioner was that the reservation of eighty rods was a permanent reservation.

4th. The holding was that in no case would a claim be allowed to saddle the stream, inasmuch as that would give more than 80 rods of water line.

5th. No location can be allowed which would in any way prevent access to the water front.

6th. The holding was that there must be a strip of land at least forty acres, in square form, intervening between the locations.

(Signed) FRED DENNETT."

COPY.

'A' W. B. P. W. B. P.

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.
WASHINGTON,

September —, 1911.

The Honorable,

The Secretary of the Interior.

Sir:

I have the honor to invite your attention to the provisions of the first section of the Act of Congress approved May 14, 1898, (30 Stat. 409), entitled "An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," as the same was amended by the Act of Congress approved March 3, 1903, (32 Stat. 1028), and to the several difficulties which have arisen in the path of a practical administration of that law. So much of the section referred to as pertains to the inquiry to which this communication will be addressed is here quoted as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all the provisions of the homestead laws of the United States not in conflict with the provisions of this Act, and all rights incident thereto, are hereby extended to the District of Alaska; subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu land selections pertaining to any land grant outside of the District of Alaska shall be made,

> and no land scrip, or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said District except as now provided by law; and provided further, that no more than one hundred and sixty acres shall be entered 'in any single body' by such scrip, lieu selection, or soldier's additional homestead right; and, provided further, that no location of scrip, selection or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located, by means of any such scrip or otherwise; and, provided further, that no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof; provided, that no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said District."

The difficulties to which I have previously adverted have been brought to notice as the result of attempts to construe and apply provisions of the section above cited and quoted, and may be thus stated:

First. The second proviso to the said Section 1, prohibits the appropriation, by location of scrip, by selection or exercise of a soldier's right of additional homestead entry, of any lands lying along or upon "navigable or other waters," within eighty rods of any other lands which may have been located, by means of such scrip, or otherwise, and lying along

the same waters. What is intended by the words "or other waters"? Did Congress intend to make the provisions of this statute operate in respect of lands lying upon and along the most insignificant streams, without regard to the volume of their flow and without distinction between streams flowing perennially and those whose channels carry water only at stated seasons? Are small but permanent lakes and ponds embraced by this expression, as it was intended by Congress to be understood? Or was it designed to have application only to such streams as would, according to the ordinary practice of the Land Department in executing surveys of public lands, be meandered?

It has seemed to this office that to interpret these words as referring to streams and bodies of water of every size and description would be to attribute to the law a meaning which would necessitate its suspension from operation until such time as a connected system of public land surveys in Alaska might be completely executed, and plats of such surveys provided, showing accurately the meanders of every stream and body of water, regardless of its size and character. Reference to the report submitted by the Committee of the two Houses of Congress by whom this bill was preliminarily considered affords no light on the question we are here discussing. The particular words to which we are now referring appear to have been incorporated in the bill while it was in conference. They appear to have received no attention in the short debates which fol-

lowed the presentation of the conference report, except that Mr. Lacey, Chairman of the House Committee on Public Lands, and one of the conferees for the House, in presenting the report of the Conference Committee, stated that, as now framed, the bill would "prevent monopolization of all streams and water courses."

The words "or other waters" can scarcely be said to be of such vague meaning or ambiguous application as to justify their rejection as unintelligible. The consequences to which construction in accordance with their literal meaning would lead would not be quite absurd, although perhaps inconvenient, and far reaching. After a reasonably full and careful examination of the matter, I can find no good warrant for disregarding these words, or for the departing from their literal meaning, and am of opinion that the legislature intended to conserve access to all permanently flowing or continuous bodies of waters.

Second. Shall the reserved space of eighty rods between claims be measured in a line parallel to the shore line, and following its indentations, or shall it be a straight line, drawn between the two corners on the water front?

It has been held by the Department (Instructions, 29 L. D. 95) that the width of a claim along the shore line must be measured in a line parallel to the meanders of the shore. It is not believed, however, that this rule should govern measurements of reserved spaces *between* claims, and that this space

should be of the full width of eighty rods at all points on its two parallel side lines.

Third. With reference to the limitation on location of scrip and other analogous rights on lands lying along unnavigable waters, did Congress intend to provide for permanent reservation of these intervening strips of land, or was the provision made out of a purpose to prevent monopolization by means of scrip locations and lieu selection rights, leaving the lands embraced in such intervening strips subject to appropriation by entry under laws requiring settlement and residence, or, perhaps, subject to acquisition by purchase for trade and manufacturing purposes?

It is to be remembered that there are two separate and distinct provisions of this statute by which spaces eighty rods in width between claims are exempted from specific appropriations or reserved from appropriation of any kind. The first of these, and the one we are here considering, is found under the first proviso, while the other is annexed by the succeeding proviso, and related to reservations of areas of the same width along *navigable* waters. To this last provision we shall hereafter refer. After a careful examination of the language of the first of these provisions, I am of the opinion that the prohibition against appropriation which it expresses was leveled only against acquisition by any of the methods therein specified, and not against entry under laws contemplating residence and cultivation, or laws providing for occupation and purchase for

trade and manufacturing sites. I shall not indulge in any extended discussion of the reasons for this conclusion, believing that it is in accordance with the natural import of the language employed in the Act, and that the meaning of the statute cannot well be extended by construction beyond what it naturally signifies.

Fourth. If the purpose of the law in the proviso above discussed is to protect streams and water courses from monopolization, regardless of the character of the stream, and if the limit of width which any claim lying along and upon such a stream may possess is eighty rods, may a location or selection be permitted to be made so as to embrace land on both banks of such a stream, thus appropriating a space of eighty rods wide on each side thereof?

If the intent of the law is to be respected and executed in the fullest measure, it might seem that only one bank of any stream would be subject to appropriation under and by means of one claim, and that no claim could be so located as to saddle the stream and appropriate both banks. This question bears some importance in connection with the question heretofore referred to, in relation to the width of claims along the shore line, for the meanders of one shore of a stream may, and often do, differ materially from those of the opposite shore. In view of this fact, it will be at once apparent that, if a claim may be thrown across a stream so as to embrace land on both banks, without any variation in the direction of the courses of its boundary lines,

the length of the shore line appropriated on one bank will be often considerably greater than that of the shore line of that portion of the claim on the other bank.

Fifth. Addressing ourselves now to the reservation of spaces of eighty rods along navigable waters:

To what depth or distance back from and away from the water front shall these reservations be extended in order to accomplish the intent of Congress?

It is well to remember in this connection that the Act of Congress of March 3, 1903, *supra,* affected only so much of the provisions of the Act of May 14, 1898, as were contained in Sections 1 and 10, and did not disturb or impair the force of *all* of the provisions of the last named section. Among the provisions of the earlier Act seemingly remaining in force is that one found in Section 10, whereby the Secretary of the Interior is empowered to grant leases of those reserved strips of land, eighty rods in width, along the shore of navigable waters, authorizing their use for landings and wharves is secured by the roadway sixty feet in width, parallel with the shore line, reserved by and in Section 10 of the last mentioned Act. The design of Congress in making these reservations being thus made manifest, nothing remains to be determined except the question as to what shall be the dimension of these spaces, as measured from front lines to back lines. Shall this measurement be a distance greater or less than eighty rods? Shall these spaces be eighty rods square, or shall they be of such extent and area as to embrace

all the land lying between the claims which they separate, from their courses on the water front, to the corners marking their rear or back boundaries?

In my opinion, this question should be answered by holding that these reservations should be eighty rods square. There seems to be no rule or reason which would fix their dimensions differently, unless the words "a space of eighty rods * * * between all such claims" shall be taken to mean a space eighty rods wide at all points on the lines of these claims on either side of said space. It would seem that the object of the legislation would be sufficiently secured by a construction which would make these reserved spaces eighty rods wide as well as eighty rods in depth, and that this would be arriving at the intention of Congress as nearly as the language it has used will permit.

Sixth. The first proviso to this section expresses a limitation upon the acquisition of lands, in a single body, by the use of scrip, soldier's additional right of homestead entry, or lieu selection, to an area of 160 acres. What is intended by the words "a single body"? and does this prohibition go to only such acquisition by one and the same person, or does it extend to and embrace acquisition by two or more persons, disconnected in interest and unassociated?

In my opinion, a connected body of land is not rendered any the less "a single body" by drawing across it an imaginary or invisible line of division, or even by such visible separation as would be accomplished by means of marked boundaries or fences. In

Jesse D. Carr Land and Live Stock Company v. United States (118 Fed. Rep. 821), it was held that a division fence constructed for the convenience of the occupant did not make two separate enclosures out of what was otherwise one general enclosure. In another case, where a tract of land was situated in two counties, the mere fact that it was crossed by the county line was held not to make it any the less a "single tenement." *Finney v. Somerville* (80 Pa. 59). To me, it seems that the principles, if not the letter of the law, would be violated by a conclusion to the effect that a connected and contiguous body or tract of land, owned by the same person, could be made two separate bodies by drawing across it a surveyor's division line. As to the other branch of this inquiry, whether two different and unassociated persons may lawfully acquire, by separate and distinct locations, an area of more than 160 acres, which, but for the surveyor's division, and separation of ownership, would constitute a "single body" of land, there may be more room for doubt and discussion. Closely scanning the statute, however, I think we may preceive the legislative purpose to restrict alienation of public lands in Alaska, through and by means of scrip locations and rights analogous thereto, to 160 acres, in a connected body, and that in the interpretation and application of this enactment we are obliged to disregard artificially created divisions. The intent of the Act seems to be one to avoid monopolization of land in favored localities, by persons in a position to purchase and employ

these floating and transferable rights; and this intent can scarcely be secured, if we are to recognize artificially effected divisions as creating two separate bodies of land out of what would be, but for such division, a "single body." Of course, the power of regulation conferred upon the Department will authorize it, if this view of the law be adopted, to prescribe and enforce a requirement by virtue of which there will be preserved, between all such scrip locations, tracts of lands of such form and area as will be practically available for homestead entry, or capable of disposition, under some other provision of the laws relating to public lands in Alaska.

Very respectfully,

Acting Commissioner.

It may be argued that this rule of the Department can not be considered by this court for the reason that it is not in the record, as this decree was made on a demurrer to the amended complaint, but the memorandum was used in the argument of the case in the District Court and it is one of which we think the court will take judicial knowledge as shown by the case of *Southern Pacific R. R. Co. v. Groeck,* 68 Fed. 609. This case decides that the acts of the Secretary of the Interior done in the performance of his official duties are matters of which the court takes judicial notice, citing *Caha v. U. S.,* 152 U. S. 211, but under any circumstances we think that this matter should be given great weight by the court as an argument in support of the appellant's contention.

We will now endeavor to analyize the reason given by the District Court for the conclusions arrived at in its construction of the law. It will be noted that the decision of the District Court is largely based upon what the court conceived to be the analogy of the placer mining law to the law under discussion, the court holding that while there is a restriction in said mining law of 160 acres to an association, and 20 acres to an individual, said restriction does not prevent the location of contiguous claims to an unlimited extent and holding further, that the term "location" as used in the mining law is practically synonymous with the term "entry" as used in the Act of March 3, 1903. In regard to this argument we will say that while on first inspection there may appear an analogy between said laws, it will not, we think, bear scrutiny or analysis. There is a vast difference between the meaning of the word "location" as used in the mining law and the word "entry" as used in the homestead laws. Before a location can be made upon mineral land it has been held by the United States Courts and other courts, by an abundant and unvarying line of authorities, that there must be a discovery of mineral before the location can be made and the same interpretation had been placed upon the placer mining law. (See *Steel v. Farmers M. Co.,* 148 Fed. 78). In other words, there could not be an unlimited quantity of land taken up under the mining law, because before a location could be made a discovery of mineral is required. That condition and prerequisite consti-

tute in itself a limitation upon the number of acres of mineral ground that can be taken.

Furthermore, it has been the policy of the Government to favor the development and discovery of minerals and all laws concerning mineral lands have received a liberal construction, as is shown by the very case which is cited by the District Court in its decision, *Shenk v. Aumiller,* 217 Fed. 969. On the other hand, an entry under the homestead laws consists of three things; first, the applicant must make the affidavit required; second, formal application; and third, the payment of the fees, (See 6 Fed. Stat. Ann. 286), and practically the same procedure applies in the case of an entry under the soldier's additional homestead rights, only there is no limit to the entries that may be made, provided a person owns the necessary additional homestead rights. There is no inherent restriction therefore as to such entries, as there is in the case of a location on mineral land, which makes a most important and significant distinction in the meaning of the two words.

From the passage of the Act of May 14, 1898, extending the homestead laws and the right of entry under soldier's additional homestead rights to Alaska, there was an unlimited right to enter soldier's additional homestead rights in the lands of Alaska, up to the law of March 3, 1903. If the interpretation and construction of the District Court in its decision is sound and will prevail, then there is no change whatsoever made by the amendment made by the Act of March 3, 1903. This view of the amend-

ment of the law of 1903 is not tenable, we think, or in accordance with the spirit or letter of the Act. That so far as it relates to entries by soldier's additional scrip it is restrictive as shown by its language. It was restrictive on locations by scrip under the former law of 1898, and was intended to be further restrictive not only of scrip entries, but also upon soldier's additional homestead entries by the language of the amendatory Act of March 3, 1903.

And it will be thus seen that Congress has always exhibited an entirely different policy in regard to mineral lands from its policy in regard to taking up lands in Alaska by scrip rights and those analagous thereto.

When Patents May Be Annulled.

At the outset of the discussion we said that the controlling question to be decided by the court is the one which has just been discussed concerning the construction and interpretation of the Act of Congress of March 3, 1903, but there are other questions of minor importance which arise and which are necessary to discuss. Concerning the granting of the patent by the Land Department of the United States to the defendants, the law is settled that questions of fact arising in the administration of the public land laws are committed to the officers of the Land Department for determination largely on *ex parte* proceedings and if applicants for grants and patents impose on said officers and secure entries and patents, any patent which may be secured by such fraudulent practices is either void or voidable and may be

annulled in a suit brought by the Government against the patentee, or purchaser with notice of the fraud.

United States v. Minor, 114 U. S. 233.
Smelting Co. v. Kemp, 104 U. S. 653.
Burfenning v. Chicago, etc., R. Co., 163 U. S. 321.
Morton v. Nebraska, 21 Wall. (U. S.) 660.
Eastern Oregon Co. v. Brosman, 147 Fed. 809.

Another unquestioned rule is that if the officers of the Government act without authority and if the land which they permitted to go to patent was not within their control or had been withdrawn from their control at the time they undertook to exercise such authority, then their act was void for want of power in them to act on the subject matter of the patent, not merely voidable. As was said in *Morris v. United States,* 174 U. S. 243, quoting from *Smelter Co. v. Kemp,* 104 U. S. 636-641:

> "Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the Department had jurisdiction to act and execute; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale.
>
> * * * If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the Department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming

regularity the forms of law may have been observed.

The action of the Department would in that event be like that of any other special tribunal not having jurisdiction of a case which it assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act."

See also *Doolan v. Carr,* 125 U. S. 625, with a large number of citations, *Burfenning v. Chicago, etc., Railway Co.,* 163 U. S. 321. In the present case it is the contention of the Government that the officers of the Land Department issued a patent to the defendant, William B. Poland, that was void. Congress in this case by the Act of March 3, 1903, had placed an inhibition upon the issuance of any patent upon an entry under soldier's additional homestead rights of more than 160 acres "in any single body," while in the present case there was a single body containing 319.75 acres. Such is the allegation in the amended complaint and this allegation is admitted by the interposition of the demurrers of the defendants.

In other words, Congress had absolutely taken it out of the powers of the officers of the Government to grant a patent of more than 160 acres in any single body, and the patent issued on Survey No. 242 was absolutely void for want of power and authority of the Land Department to make it, as it gave the defendant, William B. Poland, taken in

connection with his patent for Survey No. 241, a tract of 319.75 acres in a single body, in contravention to the plain language and spirit of the statute. And it made no difference whether there were any regulations made by the Secretary of the Interior in force at the time. The regulations could fix the space to separate the tract, but under no circumstances had the Land Department any authority to grant a patent to more than 160 acres of land "in any single body." The language is not in any single entry but in any single body, and to say that a man can take 319.75 acres of land in a single, contiguous body as was admittedly done in this case, is to take a position at utter variance with and in defiance of the statute.

No Tender Necessary.

Another question has arisen on the demurrer concerning the absence of a tender or offer in the plaintiffs' amended complaint on the part of the Government to return the soldier's additional homestead right which was used by the defendant in obtaining his patent.

The Government contends that in a case of this character no tender or offer is necessary to be made. The maxim that he who seeks equity must do equity is not violated by the omission of the plaintiffs to do so, and in a suit to cancel a patent, upon the ground of fraud or wrongful act, to obtain the issuance thereof, it is not necessary to allege a restoration of or an offer to return the consideration or even a willingness to do so, in order to obtain equit-

able redress. The court has full power and control over the matter and may prescribe or not as it sees fit under the circumstances and equities of the case whether a restoration of the consideration should be made.

In *Morris v. United States,* 174 U. S. 244, it was said:

> "It is urged on behalf of those claiming under the Kidwell patent that a court of equity will not set aside the patent at the suit of the United States, unless on an offer by the latter to return the purchase money; that, in granting the relief, the court will impose such terms and qualifications as shall meet the just equities of the opposing party.
>
> As the invalidity of the patent in the present case was not apparent on its face, but was proved by extrinsic evidence, and as the controversy respecting the title was not abandoned by the defendants, they were not, we think, entitled to a decree for a return of the purchase money, or for costs. *Piersoll v. Elliott,* 6 Pet. 95."

See also,

United States v. Trinidad Coal & Coking Co., 137 U. S. 160.

United States v. Budd, 144 U. S. 154.

Jones v. McGinn, 140 Pac. 995.

Bryant v. Isburgh, 74 Am. Dec. 661.

Van Liew v. Johnson, 6 Thomp. & C. 648.

Anthony v. Day, 52 How. Prac. 35.

Bloomer v. Waldron, 3 Hill, 366.

Hoyt v. Jacques, 129 Mass. 286.

No Question of Bona Fide Purchaser.

No question of bona fide purchaser can enter into this case as the case was one in which the patent was issued without authority or power on the part of the officers of the Land Department. Furthermore, the plea of bona fide purchaser would be one of pleading a proof of payment and the recital of the deed would not constitute such proof of payment.

United States v. Brannan, 217 Fed. 851.
United States v. Hill, 217 Fed. 846.
Boone v. Chiles, 10 Pet. (U. S.) 177.

Amount Involved.

In regard to the amount involved and the value of the subject matter in controversy, the affidavits filed in the District Court show that it is over $500, the amount required by Section 1337, of the Compiled Laws of Alaska, for the purpose of taking an appeal to the Circuit Court of Appeals.

When there is nothing in the complaint of the case to show such value, it is proper practice for the court below to allow affidavits to be filed showing the value.

Wilson v. Blair, 119 U. S. 387.
Sharon v. Terry, 36 Fed. 349.
Davie v. Heywood, 33 Fed. 95.
Gage v. Pumpelly, 108 U. S. 164.
Harris v. Barber, 139 U. S. 366.
Chesapeake Beach R. R. v. Washington R. R., 199 U. S. 248.

It is the amount which appears in the appellate court that governs the right of appeal.

Decker v. Williams, 73 Fed. 308, citing:
Gordon v. Ogden, 3 Peters (U. S.), 33.
National Bank of Keokuk, 154 U. S. 626.
Jones v. Fritzle, 154 U. S. 590.
Railway Co. v. Booth, 152 U. S. 671, and a large number of other cases from the U. S. Supreme Court.

There is no conflict shown in the record as to the value of the subject matter in controversy, as two of the affidavits filed in the District Court show that such value is $5000, and the other affidavit fixes the value at $3000, and no counter affidavits were filed by the defendants.

Conclusion.

The United States, the appellant, therefore contends that the patent in this case made to William B. Poland for the tract of one hundred and sixty acres of land, embraced in U. S. Survey No. 242, is void for want of power on the part of the Land Department to issue the same, and that there was manifest error in the decision rendered in the District Court in sustaining the demurrers of the defendants, the appellees herein, and each of them, and that the District Court was manifestly in error in the interpretation and construction placed upon the Act of Congress of March 3, 1903. That for these reasons, the decree and amended decree made and entered herein in favor of the defendants and dis-

missing the amended complaint of the plaintiff should in all respects be reversed.

Respectfully submitted,

WILLIAM N. SPENCE,
United States Attorney.

WILLIAM A. MUNLY,
Assistant United States Attorney.